No. 85-1129

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNTIONAL UNION LOCAL 715,
Respondents.

RESPONDENT TRANSPORTATION AGENCY'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May an employer consider gender as a factor in promoting a qualified woman where none of 238 persons employed in the job category were female and where the employer's voluntary affirmative action plan set no quotas, but permitted gender to be a factor in employment decisions until such time as the employer's workforce is representative of the local area labor force?

TABLE OF CONTENTS

	Pages
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
I. Facts and Background	1
II. Decisions Below	4
Reasons for Denying the Petition	7
I. The Decision of the Ninth Circuit is consistent with the Standards set forth by this Court in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) and presents no facts which would give rise to a new issue requiring review by this Court.	7
II. The Decision of the Ninth Circuit is not in irreconcilable conflict with Seventh Circuit decisions.	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Pages

CASES:

Britton v. South Bend Community School Corp., 775 F2d 794 (7th Cir 1985) 10

Fullilove v. Klutznick, 448 U.S. 448 (1980) 8

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 at 340 n.10 (1977) 7

Janowiak v. Corporate City of South Bend, 750 F2d 557 (7th Cir 1984) 53 U.S.L.W. 3896 (U.S. June 10, 1985) 9, 10

Johnson v. Transportation Agency, Santa Clara County, et al., 748 F2d 1308 (9th Cir 1984) 4, 9, 10

McDaniel v. Barresi, 402 U.S. 39 (1971) 8

North Carolina Board of Education v. Swann, 402 U.S. 43 (1971) 8

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 8, 9

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 8

United Jewish Organizations v. Carey, 430 U.S. 144 (1977) 8

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 4

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The Respondent Transportation Agency, Santa Clara County, California, hereinafter referred to as "Agency," respectfully submits this brief in opposition to the petition for writ of certiorari, which was received on January 6, 1986.

STATEMENT OF THE CASE

I. Facts and Background

Petitioner Paul Johnson brought this action in the United States District Court for the Northern District of

California alleging that he was a victim of "reverse discrimination" when the respondent Santa Clara County Transportation Agency (Agency) promoted Diane Joyce, a qualified woman with many years of Agency experience. The Agency considered her gender as a factor supporting her promotion in view of statistics that none of 238 employees in the skilled craft job category were female.

During the spring of 1980 the Agency had a vacancy for the position of Road Dispatcher. Road Dispatchers assign crews, equipment and materials to various road maintenance jobs, and maintain various records concerning the status of workers, materials and equipment. The Agency established minimum qualifications for the position of Road Dispatcher as follows: four years of previous dispatch experience or four years of road maintenance work with the County of Santa Clara. (Pet. App. 18a)

On April 29, 1980, an oral board rated nine applicants for the position of Road Dispatcher. Seven of the applicants received passing ratings: Mr. Kinnear ranked first with a rating of 80. Petitioner Paul Johnson was tied for second with a rating of 75. Diane Joyce was third with a rating of 73. (Pet. App. 18a)

A subsequent oral interview was held by employees of the Roads Division of the Transportation Agency and resulted in a recommendation that petitioner Johnson be hired.[1] (Pet. App. 11a, 19a)

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[1] One of the participants at the second oral interview, Mr. Baldanzi, testified that he regarded Joyce as "rabble rousing," "skirt wearing," "not a lady." (RT 153, 161) This participant testified that Joyce had only 1½ or 2 years of road maintenance work experience (as opposed to her actual experience of 5 years).

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Diane Joyce was selected by James Graebner, the Agency's Director, who, pursuant to the Agency's civil service rules, had discretion to appoint any of the top seven persons on a qualified list. (Pet. App. 4a) Graebner concluded that Johnson and Joyce were equally qualified for the position of Road Dispatcher. (Pet. App. 3a)

Prior to her promotion, Diane Joyce worked for almost five years as a Road Maintenance Worker performing a wide spectrum of "hands on" road maintenance jobs on various County roads. In addition, Joyce had 18 years of prior clerical experience, including 3-½ years as Road Yard Clerk. While employed as a Road Yard Clerk, Joyce regularly performed the functions of the Road Dispatcher part time.

Petitioner Johnson had two years of road maintenance work experience primarily related to work on bus stops, plus 11 years as a Road Yard Clerk for the County's Transportation Agency. Johnson worked for several months "out of class" as a Road Dispatcher without competing with others for the "out of class" assignment. Prior to his employment by the County, Johnson worked with a private aggregates company performing some road dispatch duties.

Agency Director Graebner also considered Joyce's gender to be a factor in support of her selection, in view of the historic pattern of employing almost no women in the Agency's Roads Division. None of the Agency's 238 skilled craft positions was held by a woman. (Pet. App. 19a, 26a, 27a)

The Agency's Affirmative Action Plan provided for consideration of gender as part of the hiring process where

women were underrepresented in certain job classifications. The plan recognized that "past practices" of discrimination may have occurred, without specifying any particular prior discriminatory practice. The plan established no quotas for hiring in any job classification. However, the plan stated that there is a long range goal of having the percentage of women in each job classification be the same as the women in the available labor market.[2] The plan acknowledged that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have been traditionally underrepresented. (Pet. App. 19a)

II. Decisions Below

The District Court found that the gender of Joyce was "*the determining factor*" in her selection (Pet. App. 4a) and rejected the Agency's defense that it was permissible to consider gender in view of statistics which showed a striking gender imbalance (0 women out of 238 skilled craft workers) which the Agency's affirmative action plan sought to remedy. The District Court ruled that the Agency failed to sustain its burden of proof that the affirmative action plan was a *temporary* measure within the meaning of *United Steelworkers of America v. Weber* 443 U.S. 193 (1979). (Pet. App. 6a-8a) The Plan "had no end date . . ." (Pet. App. 13a)

The Ninth Circuit reversed. *Johnson v. Transportation Agency, Santa Clara County, et al.*, 748 F2d 1308 (9th

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[2] At the time of trial, the Transportation Agency's Affirmative Action Plan was a one-year plan effective January 1, 1982, and stated a goal of only three out of 55 skilled craft openings to be filled by females.

Cir 1984). The Ninth Circuit held that the Agency had met its burden[3] of demonstrating that its plan was temporary, remedial and met the purposes of Title VII:

First, the Ninth Circuit concluded that the Agency plan was a temporary measure: "unlike the district court, we believe that this emphasis upon the 'attainment' of a representative work force does 'have the effect of ending preferential treatment to women' once parity is achieved." (Pet. App. 24a)

Second, the Ninth Circuit concluded that the Agency plan was remedial:

> "The promotion of Joyce to the road dispatcher position aptly served the Agency plan's remedial purpose. Statistics contained in the plan show that not one of the Agency's 238 skilled craft workers was a woman. Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation. The promotion of Joyce was a lawful attempt to remedy the conspicuous imbalance." (Pet. App. 27a)

> "Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan

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[3] The Ninth Circuit observed that "the district court's opinion is not entirely clear as to whether it unappropriately placed the burden of persuading the court of the plan's validity on the employer." Whether the employer has a burden of persuasion or merely a burden of production is not material: the Ninth Circuit held that the Agency "has met the higher burden." (Pet. App. 30a)

is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics. In *Weber,* the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice. *Weber,* 443 U.S. at 198 n. 1." Pet. App. 26a-27a)

Third, the Ninth Circuit concluded that the Agency plan would not bar men from promotional opportunities:

"The plan does not indicate, however, that other employees will be barred or that their interests will be unnecessarily infringed. In fact, as in *Weber,* the plan contemplates the expansion of opportunity for all. Shortly before the plan was adopted, the county approved 734 new Agency positions to support the expansion of the county bus fleet from 236 to 516 buses. The plan notes that '[a]s the County Transit System continues to expand, additional positions will need to be authorized.'

Johnson argues that the selection of Joyce as road dispatcher served as a complete bar to his selection for the position. We reject this narrow view. . . . When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interest of other employees. The record contains no evidence of such a pattern in this case. Pursuant to the Agency plan, Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate. The fact that her sex may have been the decisve factor in the selection of a woman for this particular opening does not indicate that men will always be excluded."[4] (Pet. App. 28a-29a)

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[4] Indeed, an additional Road Dispatcher position has been added by the Agency since 1982, and both petitioner Johnson and Diane Joyce have been promoted.

Finally, the Ninth Circuit concluded that the promotion of Joyce was a lawful effort to remedy an entrenched pattern of manifest imbalance and consistent with the remedial purposes of Title VII.

REASONS FOR DENYING CERTIORARI

I. THE DECISION OF THE NINTH CIRCUIT IS CONSISTENT WITH THE STANDARDS SET FORTH BY THIS COURT IN UNITED STEELWORKERS OF AMERICA v. WEBER, 443 U.S. 193 (1979) AND PRESENTS NO FACTS WHICH WOULD GIVE RISE TO A NEW ISSUE REQUIRING REVIEW BY THIS COURT.

There is no dispute that gender was an additional positive factor in the Agency's decision to promote Diane Joyce. The question is whether or not it was permissible to consider gender, given statistics which show a striking gender imbalance in the Agency's workforce.

Standing alone, statistics that none of 238 skilled craft workers are female is evidence of discrimination against women. As this Court stated in *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 at 340 n. 10 (1977):

> "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

In *Weber,* the *employer* determined that there was a "conspicuous racial imbalance," and this Court took judicial notice of the historic exclusion of blacks from craft unions. (*Weber,* 443 U.S. at 198 n. 1) *Weber* did not require proof of purposeful discrimination by the employer as a prerequisite for an affirmative action plan designed to remedy a conspicuous imbalance. In *Weber,* only 1.83% of the employer's skilled craft workers were black, in contrast to 39% black local labor force.

Here, as in *Weber,* the *employer* Agency made findings of imbalance. It determined that there were "entrenched patterns in hiring and promotion" of women, especially in skilled craft jobs such as road dispatcher. Here, the statistics showed greater imbalance than in *Weber: none* of 238 skilled craft workers was female.

This Court has consistently approved race or gender conscious plans designed to "abolish traditional patterns" of discrimination. *Weber,* 443 U.S. at 204, *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Regents of the University of California v. Bakke,* 438 U.S. 265, (1978); *United Jewish Organizations v. Carey,* 430 U.S. 144, (1977); *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, (1971); *McDaniel v. Barresi,* 402 U.S. 39, (1971); *North Carolina Board of Education v. Swann,* 402 U.S. 43, (1971). As Justice Blackmun emphasized in his concurring opinion in *Weber,* 443 U.S. at 213-14, a preferential hiring plan which seeks to remedy an historic or traditional statistical imbalance is reasonable and consistent with Title VII.

The remedy chosen here was to consider female gender as an additional positive factor in the promotion

process. This is similar to the remedy approved in *Bakke*, wherein this Court held that race could be used as a positive factor to be considered in school admissions process.

Moreover, the remedy chosen here is less intrusive upon the majority than plans such as *Weber* where there are quotas or other rigid preferences.

II. THE DECISION OF THE NINTH CIRCUIT IS NOT IN IRRECONCILABLE CONFLICT WITH SEVENTH CIRCUIT DECISIONS.

The Petitioner contends that the Ninth Circuit *Johnson* decision cannot be reconciled with *Janowiak v. Corporate City of South Bend*, 750 F2d 557 (7th Cir 1984), petition for cert. filed 53 U.S.L.W. 3896 (U.S. June 10, 1985). The petitioner reads *Janowiak* to disapprove affirmative action plans based solely upon a statistical disparity and reads *Johnson to* approve a plan based solely on statistics.

The petitioner misreads both cases. In *Janowiak*, the Seventh Circuit disapproved a racial preference hiring plan which had been approved by the district court on *summary judgment* based solely upon statistics which showed racial imbalance. A factor crucial to the *Janowiak* decision was that there was contrary evidence before the district court that two public task forces found *no* discrimination in the employer's hiring policies. This factual dispute could not be resolved by summary judgment. *Janowiak*, 750 F2d at 558-0, 562-3.

In contrast, the Ninth Circiut carefully reviewed the entire trial record in *Johnson* and concluded the Agency plan served a remedial purpose consistent with Title VII.

Janowiak has been carefully distinguished by a subsequent Seventh Circiut decision which is consistent with *Johnson.* In *Britton v. South Bend Community School Corp.,* 775 F2d 794 (7th Cir 1985), the Seventh Circuit stated that "*Janowiak* does not purport to require a finding of past discrimination for an affirmative action plan in a traditionally segregated job category to survive a Title VII challenge." 775 F2d at 805, n. 13. In *Britton,* the Seventh Circuit upheld a no minority layoff provision based primarily upon statistical disparities between black teachers (10.4%) and blacks in the community (22%), as well as upon findings by administrative bodies that the employer had discriminated in the past. Interestingly, the Seventh Circiut would not have required the administrative findings of past discrimination: "we would not hesitate to follow the Supreme Court's lead and take judicial notice of the fact that teaching is a 'traditionally segregated job category.' " 775 F2d at 805

The Ninth Circuit has taken a similar approach: In *Johnson,* it commented that an employer "need not show its own history of purposeful discrimination." (Pet. App. 26a) In *Johnson,* the statistics were compelling (no women out of 238 skilled craft workers); and the Ninth Circuit concluded that the district court should not have required an employer to show its own history of discriminatory practices. (Pet. App. 31a)

In *Britton,* "presumably the employer is itself competent to make a finding of past discrimination, for instance, *by determining that the job category is 'traditionally segregated.'* " 775 F2d 803, n. 12. In *Johnson,* the Agency had never hired a female road dispatcher, had no women skilled craft workers, and found that such positions have traditionally excluded women.

In short, the Seventh and Ninth Circuits are not in conflict with respect to the significance of statistics as support for affirmative action plans.

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CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Dated: February 3, 1986.

Respectfully submitted,

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